



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

FRED SMITH, III,
Plaintiff,

vs.

SHERIFF BILL BLANTON and CAPTAIN
HAROLD CROCKER,
Defendants.

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CIVIL ACTION NO. 8:09-789-HFF-BHH

ORDER

This case was filed as a 42 U.S.C. § 1983 action. Plaintiff is proceeding pro se. The matter is before the Court for review of the Report and Recommendation (Report) of the United States Magistrate Judge suggesting that the complaint be dismissed without prejudice and without issuance and service of process. The Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed the Report on April 16, 2009, and the Clerk of Court entered Plaintiff's objections to the Report on April 23, 2009.

In his objections, Plaintiff argues that he fails to see how being left in a holding cell overnight does not state a constitutional violation. However, the Court agrees with the Magistrate Judge that based on his complaint, Plaintiff at best states a negligence claim, which cannot be brought under § 1983.

Petitioner asserts his intention to retain an attorney and file a separate habeas case, and he asks for the filing forms to enable him to do that. Though expressing no opinion on the merits of any habeas case Plaintiff may bring, the Court will grant his request for those filing documents.

After a thorough review of the Report and the record in this case pursuant to the standard set forth above, the Court overrules Plaintiff's objections, finding them to be without merit, adopts the Report and incorporates it herein. Therefore, it is the judgment of this Court that the complaint be **DISMISSED** *without prejudice* and without issuance and service of process. Further, the Clerk is directed to forward the filing documents for §§ 2254 and 2241 habeas petitions to Plaintiff along with a copy of this order.

IT IS SO ORDERED.

Signed this 23rd day of April, 2009, in Spartanburg, South Carolina.

s/ Henry F. Floyd
HENRY F. FLOYD
UNITED STATES DISTRICT JUDGE

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this Order within 30 days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.